Office - Supreme Court, U.S.
FILED
NOV 5 1982
ALEXANDER L. STEVAS,
CLERK

82-784

In The

Supreme Court of the United States

October Term, 1982

VERDIA JONES,

Petitioner,

—v.—

~~CLARKSDALE MUNICIPAL SEPARATE SCHOOL DISTRICT~~, ROBERT BIRDSONG, ~~LEON PORTER, GLENN D. GATES, MAYO WILSON, JESSIE G. HUGHES, JR., ROBERT ELLARD, TERRY MOOD,~~ et al., *Respondents.*

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

CHARLES VICTOR MCTEER
WILLIE L. BAILEY
MCTEER & BAILEY, P.A.
P.O. Box 1835
218 S. Theobald Street
Greenville, MS 38701
(601) 335-2100
Attorneys for Petitioner
Verdia Jones

Questions Presented for Review

1. Whether Rule 38, Federal Rules of Civil Procedure requires a party to submit a demand for jury trial following the filing of such a demand by another party.

2. Whether a party waives the right to trial by jury when he relies upon another party's previously submitted demand for jury trial.

3. Whether parties to a suit seeking equitable relief and legal damages for humiliation, embarassment, mental pain and suffering in an employment discrimination action based upon race under 42 U.S.C. § 1981 and 1983 are entitled to trial by jury on the legal claims.

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Opinion and Orders Below 1

Jurisdiction 1

Constitutional Provisions, Treatise, Statutes, Ordinances and Regulations Involved 1

Statement of the Case 4

Jurisdictional Grounds in the Lower Court 11

Argument 11

The Parties To This Action Were Denied Their Seventh Amendment Right To Trial By Jury Of Their Legal Claims 11

The Parties Were Entitled To Trial By Jury On The Legal Issues Raised In The Original Complaint 12

All Procedural Requirements Mandated Under Rule 38 C. The Federal Rules Of Civil Procedure Were Met By The Parties 14

Mrs. Jones Was Entitled To Rely Upon Another Party's Jury Demand 15

PAGE

Mrs. Jones Did Not Waive Her Seventh Amendment Rights By Failing To Object To The District Judge's Denial Of Another Party's Jury Demand 17

CONCLUSION 19

APPENDIX 1a

Opinions Below 1a

Orders Below 44a

Order Denying Rehearing 52a

Jury Demands 55a

Motion to Strike Demand For Jury Trial 56a

TABLE OF AUTHORITIES

Cases:

Aetna Insurance Co. v. *Kennedy*, 301 U.S. 389 (1937) 13, 17

Allen v. *Amalgamated Transit Union Local 788*, 544 F.2d 876 (8th Cir. 1977), *cert. denied*, 434 U.S. 891 13

Amburgey v. *Cassady*, 507 F.2d 728 (6th Cir. 1974) 13

Bell v. *Hood*, 327 U.S. 678 (1946) 12

Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) 12

Busche v. *Burkee*, 649 F.2d 509 (7th Cir. 1981) .. 12, 13

Calnetics Corp. v. *Volkswagen of America Inc.*, 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 15

Carey v. *Piphus*, 435 U.S. 247 (1978) 12, 14

PAGE

Claiborne v. *Illinois Central Railroad*, 583 F.2d 143 (5th Cir. 1978) 9, 13

Collins v. *Government of the Virgin Islands*, 366 F.2d 279, *cert. denied*, 386 U.S. 958 (1967) 15

Cram v. *Sun Insurance Office, Ltd.*, 375 F.2d 670 (4th Cir. 1967) 15

Curtis v. *Loether*, 415 U.S. 189 (1974) 12

Degiola v. *United States Lines Co.*, 304 F.2d 421 (2d Cir. 1962) 15

Donovan v. *Reinbold*, 433 F.2d 738 (9th Cir. 1970) 13

Famiano v. *Engcort*, 398 F.2d 661 (7th Cir. 1968) 15

Faraca v. *Clements*, 506 F.2d 956 (5th Cir. 1976), *cert. denied*, 422 U.S. 1006 13

Flora v. *Moore*, 461 F. Supp. 1104 (N.D. Miss. 1978) 17

Garner v. *Giarrusso*, 571 F.2d 1330 (5th Cir. 1978) 13

Great American Savings and Loan Association v. *Novotny*, 442 U.S. 366 (1979) 12

Harkless v. *Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970) 9, 14

Imbler v. *Pachtman*, 424 U.S. 409 (1976) 12

Johnson v. *Fidelity & Casualty Co. of New York*, 238 F.2d 322 (8th Cir. 1956) 15, 16

Johnson v. *Railway Express Agency*, 421 U.S. 454 (1975) 12

Johnson v. *Ryder Truck Lines Inc.*, 575 F.2d 471 (5th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979) .. 13

Jones v. *Birdsong*, 530 F. Supp. 221 (N.D. Miss. 1980) 6, 7

PAGE

Lynch v. *Pan American World Airways*, 475 F.2d 764 (5th Cir. 1973) 7, 9, 14

Monroe v. *Pape*, 365 U.S. 167 (1961) 12

Rachal v. *Hill*, 435 F.2d 59 (5th Cir. 1970) 15

Schneider v. *City of Atlanta*, 678 F.2d 915 (5th Cir. 1980) 13

Sethy v. *Alameda County Water District*, 545 F.2d 1157 (9th Cir. 1976) 13

Southland Reship, Inc. v. *Floyd*, 534 F.2d 639 (5th Cir. 1976) 15

Whiting v. *Jackson State University*, 616 F.2d 116 (5th Cir. 1980) 9, 12

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment 7 2

United States Constitution, Amendment 14, Section 1 and Section 5 ..... 2-3, 6, 11

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 ..... 4, 11

28 U.S.C. § 1343 ..... 4, 11

42 U.S.C. § 1981 ..... 1, 4, 6, 9, 11, 12, 13

42 U.S.C. § 1983 ..... 2, 4, 6, 11, 12, 13

42 U.S.C. § 2000e 6

Rule 38(a) Federal Rules of Civil Procedure 3

Rule 38(b) Federal Rules of Civil Procedure . 3, 7, 14

Rule 38(c) Federal Rules of Civil Procedure 3

PAGE

Rule 38(d) Federal Rules of Civil Procedure ... 3, 16

Rule 38(e) Federal Rules of Civil Procedure 4

Rule 39(a)(1) Federal Rules of Civil Procedure . 4, 16

Rule 39(b) Federal Rules of Civil Procedure 13

Rule 52(a) Federal Rules of Civil Procedure 7

TEXTBOOKS AND TREATISES

5 J. Moore and J. Lucas, Federal Practice, § 38.39[1] and § 38.45 (2nd Ed. 1981) 16

9 Wright and Miller, Federal Practice and Procedure Civil: § 2318 at 85 15

Opinions and Orders Below

The opinion of the District Court for the Northern District of Mississippi is reported at 530 F. Supp. 221 (N.D. Miss. 1980). The opinion of the Court of Appeals for the Fifth Circuit is reported at 679 F.2d 24 (5th Cir. 1982).

The orders of the United States District Judge denying the parties trial by jury were made and entered on 3 January 1978, 12 July 1978. Copies thereof are appended to this petition in the Appendix.

The order of the United States Magistrate denying the parties trial by jury were made and entered on 21 March 1979. A copy is appended to this petition in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on 24 May 1982 and copies thereof are appended to the petition in the Appendix. On 19 July 1982 the Fifth Circuit Court of Appeals denied Mrs. Jones' Petition for Rehearing and Suggestion for Rehearing *en banc*. On 7 October 1982, Mr. Justice Byron White signed an order extending the time for filing this petition until 6 November 1982. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions, Treatise, Statutes Ordinances and Regulations Involved

42 U.S.C. §1981

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security

of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Seventh Amendment to the United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.

Fourteenth Amendment to the United States Constitution

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any persons within its jurisdiction the equal protection of the laws.

Section 5

The congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Rule 38 of the Federal Rules of Civil Procedure

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 39(a), Federal Rules of Civil Procedure

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (a) the parties of their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

Statement of the Case

A. Nature of the Case

Petitioner Verdia Jones presents this Petition seeking review of a decision denying the parties trial by jury of certain damage claims presented in her employment discrimination action. On 23 September 1977 Mrs. Jones, a former black guidance counselor at Clarksdale High School, and the only black or female person to have held that position, filed her complaint in the United States District Court for the Northern District of Mississippi pursuant to 42 U.S.C. § 1981, 1983 and the equal protection clause of the Fourteenth Amendment to the United States Constitution. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331 and 1343. Additionally, Mrs. Jones sought application of the court's pendent jurisdiction to adjudicate her state contract

claims. She alleged that the respondent school district discriminated against her on the basis of race.

The suit included six basic claims. First, she contended that she was segregated from all white guidance personnel and secretarial staff and did not have the same access to student records and clerical assistance as white counselors. Second, she did not have the same professional rights, privileges and benefits of employment as white counselors. Third, she was assigned subordinate and inferior job tasks when compared to white counselors. Fourth, her employment was conditioned upon the availability of federal funds whereas white counselors were unconditionally paid from School District funds. Fifth, she was required to perform job duties outside of her area of substantial experience whereas white counselors were assigned to tasks belying their training and experience. Finally, Mrs. Jones claimed that the defendants had breached her contract of employment under state law by paying her less salary than agreed. In addition to equitable relief, Mrs. Jones demanded $30,000.00 compensatory damages for the embarrassment, humiliation, mental pain and anguish caused by defendants' actions and punitive damages in the same amount.[1]

On 17 November 1977 Respondents filed their answer. Thereafter, on 22 November 1977 the Respondents made a timely demand for jury trial on Mrs. Jones' claims for backpay, compensatory and punitive damages. (See Appendix at 55a, *Infra.*) On 1 December 1977 the petitioner filed a motion to strike the School District's demand for a jury trial on the backpay issue. (*Id.* at 56a, *Infra.*) Plaintiff made no objection to Respondent's request for jury trial regarding compensatory or punitive damages.

---

[1] The complaint originally requested $10,000.00 compensatory damages and $1,000.00 punitive award. At trial, however, the Court allowed these amounts to be increased as set forth above.

On 3 January 1978 the District Judge entered its order striking all jury trial demands including the request for compensatory and punitive damage claims. (*Id.* at 49a, *Infra.*) The District Judge determined neither party to this action had any right to trial by jury on any legal or equitable action raised in the case.

> It is well settled that there is no right to jury trial in an employment discrimination suit under § 1981 or § 1983 even though claims for compensatory or punitive damages are made. *Jones* v. *Birdsong*, Civil Action No. DC 77-94-WK-0 (Order of January 3, 1978, ND Miss) (*Id.* at 49a, *infra.*)

On 16 June 1978 the defendants filed a motion for reconsideration of the order entered 3 January 1978. Mrs. Jones filed no objection to this request. Nonetheless, the trial court denied the request on 12 July 1978. On 3 August 1978 Mrs. Jones filed an amended complaint adding a claim under Title VII, 42 U.S.C. § 2000e to her claims under 42 U.S.C. §§ 1981, 1983, the equal protection clause of the 14th Amendment and state contract law.

At a pre-trial conference before a Magistrate on 3 March 1979, Mrs. Jones moved for trial by jury on the legal issues and a simultaneous non-jury trial on all equitable claims. Said request was denied by the magistrate. Neither party made any additional demands for jury trial. Mrs. Jones did not consent to any withdrawal of the defense demand for trial by jury.

Following a four-day jury trial the District Judge issued an opinion dismissing the complaint with prejudice as to all Mrs. Jones' claims. *Jones* v. *Birdsong*, 530 F. Supp. 221 (ND Miss. 1980). Thereafter, Petitioner prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit.

B. Decision of the Court of Appeals

The Court of Appeals panel (Brown, Coleman and Rubin, Circuit Judges) affirmed the trial court noting that the findings were not "clearly erroneous" as defined by Rule 52(a) Federal Rules of Civil Procedure. The judges disagreed, however, regarding Mrs. Jones' contention that the District Judge denied the parties a jury trial on her legal claims. The panel majority found that Mrs. Jones failed to object to the District Judge's denials of the respondents' demands for jury trial. The majority also found that Mrs. Jones failed to appeal the magistrate's decision denying a right to jury trial at the pretrial conference to the District Judge. In pertinent part, the court noted a "special duty" of the Petitioner herein to demand trial by jury:

> Under the circumstances, *the Plaintiff was under a special duty to speak out about any desire for a jury.* Her counsel knew, or was certainly charged with the knowledge, that in the case of *Lynch* v. *Pan American World Airways, Inc.*, 475 F. 2d 764 (5th Cir., 1973), in a racial discrimination case which sought reinstatement with back pay, compensatory damages, and punitive damages, the Fifth Circuit held that the trial court *properly struck* the plaintiff's motion for a jury trial because the action was equitable in nature. Unless the point were raised and unless there was convincing argument to the contrary, Mrs. Jones should have expected that the District Judge would consider himself bound by the ruling in *Lynch.* In conclusion, we cannot countenance an effort to reverse the District Court from ambush. *Jones* v. *Birdsong*, 679 F.2d at 25.

Additionally, the majority noted:

> What it all comes down to is that plaintiff had repeated opportunities to file a Rule 38(b) motion

> for a jury trial and she chose not to do it. When Judge Keady denied the defendants' motion for a jury trial *the plaintiff knew that she could no longer rely on that motion to obtain a jury trial for herself* but said not a word, leaving the Judge to believe that she agreed with that result. She had every opportunity to ask the trial court to review and reverse the denial of a jury trial entered by the magistrate. She chose to pursue a policy of total silence. When the trial began there was not a word said about the lack of a jury. Now that the facts have been found against her contentions, amply supported by the record, she does here what she persistently chose not to do below—she cries that she was denied the right of trial by jury. 679 F.2d at 26.

The majority expressly refused to determine or find that Mrs. Jones was entitled to a jury trial on her legal damage claims. Therefore, the District Judge's refusal to grant a jury trial was never addressed by the appellate court.

> We need not decide, and we offer no intimation, as to whether if she had properly asserted it Mrs. Jones would have been entitled to a jury trial as now claimed. 679 F.2d at 24.

> Leaving aside the issue of whether she would have been entitled to a jury if she had properly sought such a trial, we firmly decline the suggestion that the District Court should be cast in error. 679 F.2d at 26.

Hon. Alvin B. Rubin, Circuit Judge, dissented finding that the District Court was incorrect in determining upon its own initiative that compensatory and punitive damages could not be tried by a jury in an employment discrimination case.

Backpay is an integral part of the equitable remedy of reinstatement. *Harkless* v. *Swenny Independent School District*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991, 91 S. Ct. 451, 27 LEd 2d 439 (1971). Therefore, the district court was correct in denying the demand for a jury trial on the backpay issue. Compensatory and punitive damages present legal issues and are proper issues for jury determination. *Whiting* v. *Jackson State University*, 616 F.2d 116, 122 (5th Cir. 1980). This circuit, however, "has not yet decided whether actual or punitive damages are recoverable under the Title VII." *Id.* at 122 n.4. *See Claiborne* v. *Illinois Central Railroad*, 583 F.2d 143, 154 (5th Cir. 1978) ("Pretermitting the issue whether an award of punitive damages under Title VII alone would be proper, we are persuaded that such an award under section 1981 is permissible, even when the section 1981 claim is joined with the Title VII claims."), *cert. denied*, 442 U.S. 934, 99 S. Ct. 2869, 6a L. Ed. 2d 303 (1979).

The majority states that *Lynch* v. *Pan American World Airways, Inc.*, 475 F.2d 764 (5th Cir. 1973) (per curiam), held that "the trial court properly struck the plaintiff's motion for a jury trial because the action was equitable in nature." Page 25, 679 F.2d, *supra*. This statement, I respectfully submit, misconstrues the holding of *Lynch*. The court in *Lynch* stated that reinstatement with backpay was an equitable claim, not to be determined by a jury. The court also stated that the plaintiff may not "by making unsupported allegations for compensatory and punitive damages —unilaterally alter the genre of the proceeding." *Id.* at 756. *Lynch* does not suggest that a jury should be denied if there is a good faith demand for compensatory damages with some evidentiary

> support. There is no indication in the instant case that Mrs. Jones' claims for compensatory and punitive damages are either unsupported or designed unilaterally to alter the mode of trial. 679 F.2d at 27 n.4 (dissenting opinion).

Judge Rubin reasoned that Mrs. Jones was properly entitled to rely upon the School District's timely trial demand.

> The defendants requested a jury trial and Mrs. Jones is entitled to rely on that request. The district judge, as well as the magistrate, denied a jury trial on all issues. *While the district judge was never presented with an appeal of the magistrate's ruling, he was not ambushed by Mrs. Jones. He knew that a jury trial was desired and he denied that right because he thought that the litigants were not entitled to a jury trial, rather than because of any procedural failing.* Mrs. Jones did not wait until the trial was over to make her position known. She was not denied a jury trial for failure to present a demand in writing or for the insufficiency of the defendants' demand. *Id.* at 29.

Judge Rubin found that the plaintiff's silence following the court's orders denying repeated jury requests was not waiver but professional compliance with the finality of the District Judge's Ruling.

> There was thereafter no waiver of the right to jury trial, oral or written. Mrs. Jones simply complied with the court's order. Her counsel's explanation of his client's failure to expositulate further appears to me to be adequate to negate waiver. *Id.*

In footnote 8, Judge Rubin states:

> He [Mrs. Jones' counsel] states in his brief: 'After three attempts to have a jury trial it was

> adamantly [sic] clear to both parties that no jury trial would be had in this cause absent intervention by a higher court. . . . After three attempts to gain a jury trial there was no need to risk the Court's ire.' *Id.* at 29

Existence of Jurisdiction Below

The District Court for the Northern District of Mississippi had jurisdiction over Mrs. Jones' claims under 28 U.S.C. § 1331 and 1343. Mrs. Jones properly invoked the pendent jurisdiction of the court to hear her state law contract claims.

ARGUMENT

The Parties To This Action Were Denied Their Seventh Amendment Right To Trial By Jury Of Their Legal Claims.

Following the School District's jury demand, the District Judge ruled the parties were not entitled to jury trial in this employment discrimination action brought pursuant to 42 U.S.C. § 1981, 1983 and the equal protection clause of the Fourteenth Amendment. No procedural error or failure was made by any party under the Federal Rules of Civil Procedure which would cause waiver of the right to jury trial.

The Court of Appeals refused to determine that Mrs. Jones was entitled to a jury trial on her legal claims. The Court ruled that Mrs. Jones' failure to make an independent jury demand barred her from pursuing her Seventh Amendment right. The court ignored the established rule that a party may rely upon a timely jury demand made by another party and need not make an additional demand of his own. For the reasons setforth hereinafter, this court should review these decisions.

The Parties Were Entitled To Trial By Jury On The Legal Issues Raised In The Original Complaint.

> [T]he Seventh Amendment does apply to actions enforcing statutory rights and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law. *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974).

Likewise, juries may hear claims against state officials under the Fourteenth Amendment since federal courts may use legal as well as other remedies to make good the wrong done. *Bell* v. *Hood*, 327 U.S. 678 (1946); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971). 42 U.S.C. § 1981 and 1983 are independent and statutory rules conferring substantive rights to those who seek their protection. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 457-461 (1975); *Great American Savings and Loan Association* v. *Novotny*, 442 U.S. 366, 377 n.21 (1979). The equal protection clause of the Fourteenth Amendment similarly confers substantive rights to persons who are deprived privileges and immunities secured by the Constitution. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

Parties to actions brought pursuant to these independent constitutional and statutory causes are entitled to both legal and equitable remedies. The legal rights available include compensatory and, under certain circumstances, punitive damages. *Johnson* v. *Railway Express Agency*, *supra*. 421 U.S. at 460; *Carey* v. *Piphus* 435 U.S. 247, 256-257 n.11 (1978).

Litigants in employment discrimination actions raising legal claims under 42 U.S.C. § 1981 and 1983 and constitutional amendments are entitled to jury trial, upon proper demand. *Whiting* v. *Jackson State University*, 616 F.2d 116 (5th Cir. 1980); *Busche* v. *Burkee*, 649 F.2d

509 (7th Cir. 1981); *Donovan* v. *Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Amburgey* v. *Cassady*, 507 F.2d 728 (6th Cir. 1974); *Claiborne* v. *Illinois Central Railroad*, 583 F.2d 143 (5th Cir. 1978); *Johnson* v. *Ryder Truck Lines Inc.*, 575 F.2d 471 (5th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Garner* v. *Giarrusso*, 571 F.2d 1330 (5th Cir. 1978); *Allen* v. *Amalgamated Transit Union Local 788*, 544 F.2d 876 (8th Cir. 1977), *cert. denied*, 434 U.S. 891; *Sethy* v. *Alameda County Water District*, 545 F.2d 1157 (9th Cir. 1976); *Faraca* v. *Clements*, 506 F.2d 956 (5th Cir. 1976), *cert. denied*, 422 U.S. 1006. The nature of the cause *sub judice* entitled the parties to present their legal claim and defense before a jury while the District Judge adjudicated their equitable claims. This bifurcated trial procedure was approved by another panel of the Fifth Circuit in an employment discrimination case seeking damage and equitable relief under 41 U.S.C. § 1981, 1983 and the First Amendment. *Schneider* v. *City of Atlanta*, 678 F.2d 915 (5th Cir. 1980).

Judge Rubin correctly noted that the right to trial by jury is a constitutional privilege which should not be lightly inferred.

> The right to jury trial is not merely a creature of the rules of civil procedure, but is safeguarded by a jury of the suitor's peers is a favored right, and its waiver is not to be lightly inferred. *Aetna Insurance Company* v. *Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 812, 81 LEd 1177, 1180 (1937) ("courts indulge every reasonable presumption against waiver"). A federal district judge should not, therefore, be grudging in granting a jury demand. Even when the jury trial demand is not made within the ten days fixed by rule 38, the court in its discretion may order a jury trial. See Fed. R. Civ. P. 39(b). We have said that, when such a rule 39(b) motion is filed, "a court should grant a jury trial in the absence of strong and

compelling reasons to the contrary. 679 F.2d at 26 (dissenting opinion).

All Procedural Requirements Mandated Under Rule 38 of the Federal Rules of Civil Procedure Were Met by the Parties

Mrs. Jones complaint averred the alleged violation of her constitutional and statutory rights caused her embarrassment, humiliation, mental anguish and other compensable injury. *Carey* v. *Piphus*, *supra*. 435 U.S. at 255. Her demands included the equitable remedies of reinstatement and backpay as well as legal remedies of compensatory and punitive damages. In response to Mrs. Jones' legal and equitable claims, defendants filed a timely demand for jury trial pursuant to Rule 38(b), Federal Rules of Civil Procedure, demanding a jury trial on all issues. Mrs. Jones moved to strike the jury demand solely as to her equitable claims. *Lynch* v. *Pan American World Airways*, 475 F.2d 764, 765 (5th Cir. 1973); *Harkless* v. *Sweency Independent School District*, 427 F.2d 319, 324 (5th Cir. 1970).

On 3 January 1978 the District Judge citing *Lynch* v. *Pan American World Airways*, *supra.*, and *Harkless* v. *Sweeny Independent School District*, *supra.*, denied respondents' jury demand as to all claims, both legal and equitable. Thereafter, defendants filed a motion for reconsideration of the denial of a jury trial on legal issues. The defendants' second demand was deenied on 7 July 1978. At a pretrial conference before a magistrate, the plaintiff requested *ore tenus* a jury trial on all legal issues and simultaneous non-jury trial on equitable issues. By order of 21 March 1979 the request was denied. A jury demand was made timely and promptly under the Federal Rules of Civil Procedure. It was denied due to the District Judge's misinterpretation of the law. There was no procedural failure on the part of any party which triggered the jury demand denial.

The District Judge mistakenly interpreted the cited Fifth Circuit precedents in the *Lynch* and *Harkless* cases to deny the parties trial by jury of the legal claims. The Fifth Circuit majority gave credence by implication to that ruling by refusing to rule that litigants in employment discrimination cases had a right to trial by jury on legal claims. The District Judge's denial of the right to jury trial in this clearly conflicts with accepted prior rulings of Supreme Court and the various Courts of Appeals including other panels of the Fifth Circuit. This legal error was further compounded by the Fifth Circuit majority's refusal to allow Mrs. Jones to rely upon the respondents' jury demands.

Mrs. Jones Was Entitled To Rely Upon Another Party's Jury Demand

> If a timely an proper demand for a jury is made by one party, all of the parties to the action who are interested in the issues for which jury trial has been demanded may rely on that demand and need not make an additional demand of their own.
>
> 9 Wright and Miller, Federal Practice and Procedure Civil § 2318 at 85.

Numerous Courts of Appeals including the 5th Circuit have declared that a party may rely upon the timely jury demand of another party and need not make an additional demand. *Degiola* v. *United States Lines Co.*, 304 F.2d 421 (2nd Cir. 1962); *Collins* v. *Government of the Virgin Islands*, 366 F.2d 279, *cert. denied*, 386 U.S. 958 (1967); *Cram* v. *Insurance Office, Ltd.*, 375 F.2d 670, 675 (4th Cir. 1967); *Rachal* v. *Hill*, 435 F.2d 59, 63 n. 4 (5th Cir. 1970); *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 429 U.S. 940; *Southland Reship, Inc.* v. *Floyd*, 534 F.2d 639 (5th Cir. 1976); *Famiano* v. *Engcort*, 398 F.2d 661 (7th Cir. 1968); *Johnson* v. *Fidelity & Casualty Co. of New York*,

238 F.2d 322 (8th Cir. 1956); See also 5 J. Moore and J. Lucas, Federal Practice § 38.39[1] and § 38.45 (2nd Edition—1981).

Timely jury demand was made by the respondents. We find no case wherein a party was denied the right to rely upon the jury demand of his opponent. *Clearly, had the trial court hereien found for Mrs. Jones and awarded her damages, the School District could claim a denial of their Seventh Amendment rights.* Why then is Mrs. Jones denied the right to rely upon the District's jury demand?

The Court of Appeals placed the burden upon the petitioner to support another party's jury demand. "Under the circumstances, the plaintiff was under a special duty to speak out about any desire for a jury." 679 F.2d at 25. Yet, no such special duty is mentioned in the Federal Rules of Civil Proce[illegible] or court decisions interpreting these rules. No other Court of Appeals or District Court has setforth such a special duty.

The trial court was not ambushed by this appeal as suggested by the majority panel. It had full knowledge of the jury demand. *The fact that either or both parties supported the demand is irrelevant. If one party made the demand, all others had the right to rely therein.* The District Court did not deny the demand because of written or oral waiver, failure to comply with Rule 38 procedures or the conduct of any party. The trial court incorrectly denied the requested jury trial because it believed the parties were not entitled to exercise the right in the first instance.

No court has required a litigant to file an independent jury demand following a demand of another party. Under Rules 38(d) and 39(a)(1), Federal Rules of Civil Procedure, a party may not withdraw a demand absent adversarial consent of the other parties to the action. No such consent or waiver was given by Mrs. Jones on

the legal issues presented. Therefore, the majority panel's opinion creates a new interpretation of Rule 38(b) requiring a party to object to a denial of a jury demand by his adversary. This ruling completely ignores the established doctrine of reliance. It also confuses the constitutional policy and statutory procedures favoring jury trial except upon known, intentional and express waiver. *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937).

Mrs. Jones Did Not Waiver Her Seventh Amendment Rights By Failing To Object To The District Judge's Denial Of Another Party's Jury Demand

It is agreed by the parties that on two occasions the trial court denied defendant's demand for a jury trial on the legal damages issue in the absence of an objection from plaintiff. On a third occasion plaintiff made such a request which was again rejected. It is undisputed that the District Judge ruled that parties in employment discrimination suits were not entitled to jury trials even where claims for legal damages under federal and state law were annexed to the equitable claim. In this cause, the parties were completely foreclosed from a jury trial as a consequence of the trial court's view of the law in such suits and not as a result of any waiver, action or conduct of either party.

After three attempts to have a jury trial it was apparent to both parties that no jury trial would be had in this cause absent intervention by a higher court. Indeed, in another case the same District Judge awarded a defendant considerable attorney fees against a plaintiff, finding that the plaintiff's repeated demands for reconsideration of procedural issues previously ruled upon by the Court were "improvident" and "contamacious of solemn judicial orders." *Flora* v. *Moore*, 461 F. Supp. 1104, 1121 (ND Miss. 1978). Such rulings have a "chilling effect" upon the repetitious presentation of motions

before the same court no matter how worthy. After three attempts to gain a jury trial there was no need to risk the Court's ire.

The parties in this case acted with reason in asking for a jury trial on those occasions. However, at some point the parties must adhere to the ruling of the Court no matter what they may feel concerning the correctness of a particular determination. This is particularly true where the District Judge subscribes to an arguably incorrect view of the law. While many attorneys would appreciate codification of the special duty to "speak out" described by the majority panel, such conduct before some District judges would be foolhardy and unprofessional.

The jury demand had been presented and rejected. The Court had ruled that no jury trial would be held in this case. The Federal Rules of Civil Procedure do not require an independant request for jury trial or further challenge of the court's decision. Under such circumstances, the right to reliance provides a welcome respite from the prospect of continued and/or unnecessary bickering with a United States District Judge.

The majority suggests that plaintiff could have presented her own jury demand following the court's ruling denying the defense demand. Yet, the plaintiff's motion to strike expressly requested denial of the jury trial solely on equitable issues. More importantly, accepted judicial procedure allowed Mrs. Jones the right to rely upon the defense demand. Unsurprisingly, the majority opinions fails to mention the reliance doctrine.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals substantially conflicts with the decisions of this Court and all other circuits regarding the right of a party to rely upon the jury demand of another party. It further sanctions a Lower Court departure from accepted and usual judicial proceedings allowing a jury trial, upon timely demand, of legal claims in employment discrimination actions brought under 42 USC §§ 1981 and 1983 and the Equal Protection Clause of the Fourteenth Amendment. In the alternative the determination that the Seventh Amendment right to jury trial does no extend to parties regarding claims of compensatory and punitive damages for humiliation, embarrassment, mental pain and anguish in 1981 and 1983 and Title VII Employment Discrimination Actions Against State Officials raises an important question of federal law which should be settled by this court. Such Rulings call for this Court's supervision and review upon *writ of certiorari.*

Respectfully submitted,

This the 1st day of November, 1982.

CHARLES VICTOR MCTEER
WILLIE L. BAILEY
MCTEER & BAILEY, P.A.
P.O. Box 1835
218 S. Theobald Street
Greenville, MS 38701-0173
(601) 335-2100
Attorneys for Petitioner
Verdia Jones

Certificate

I, Charles Victor McTeer, do hereby certify that I have this day mailed, via United States mail, a true and correct copy of Petitioner's Petition for Certiorari to Hon. Semmes Luckett, 121 Yazoo Street, Clarksdale, Mississippi 38614.

This the day of November, 1982.

CHARLES VICTOR MCTEER

/s/ .....

CHARLES VICTOR MCTEER